

ORIGINAL

Docket No. 2001-1 CARP DSTR A 2

Copyright Owners and Performers submit that the Notice of Inquiry (“NOI”) dated November 20, 2001, see 66 Fed. Reg. 58180 (2001), has been rendered moot by virtue of Music Choice’s Motion to Withdraw and should be withdrawn by the Copyright Office. Nevertheless, Copyright Owners and Performers are filing these Reply

Comments in order to complete the record and in the event that the Copyright Office opts to move forward with the NOI, notwithstanding the filing of the Motion to Withdraw.

As stated in Copyright Owners and Performers' Joint Opposition to Request for Consolidation (dated December 20, 2001) ("Joint Opposition"), Copyright Owners and Performers believe that consolidation of the above-referenced proceedings will substantially increase the complexity of the proceedings and cause confusion and prejudice without offering any offsetting efficiencies or cost savings. XM and Sirius raise the identical concerns in their joint comments and, like Copyright Owners and Performers, urge the Copyright Office to reject the now withdrawn request for consolidation.

The only comments filed in support of the request for consolidation were submitted by DiMA, a non-party to the proceedings, on behalf of various unnamed member companies. As described more fully below, Copyright Owners and Performers find DiMA's Comments to be both inaccurate and unpersuasive. Accordingly, Copyright Owners and Performers urge the Copyright Office to disregard DiMA's Comments and reject Music Choice's withdrawn request for consolidation.

## **DISCUSSION**

### **I. MUSIC CHOICE'S REQUEST FOR CONSOLIDATION IS NOW MOOT**

On October 11, 2001, Music Choice filed a Petition to Convene Copyright Arbitration Royalty Panel and to Consolidate Proceedings ("Petition to Consolidate"). Based on this petition, the Copyright Office published the NOI seeking comments on whether the rate adjustment proceeding to determine reasonable rates and terms for the public performance of sound recordings by new subscription services should be consolidated with the rate adjustment proceeding to determine reasonable rates and terms

for the public performance of sound recordings by pre-existing satellite digital audio radio services and pre-existing subscription services.

On December 13, 2001, Music Choice filed a motion seeking to withdraw its Petition to Consolidate. In the Motion to Withdraw, Music Choice indicated that it planned to discontinue its new subscription service, Backstage Pass, as of January 2, 2002 and saw no further reason to seek a consolidated proceeding. As a result, Music Choice's Petition for Consolidation is now moot and the Copyright Office should withdraw the NOI. In the alternative, the Copyright Office should reject the Petition for Consolidation without giving it any further consideration.

## **II. THERE IS NO OVERLAP AMONG THE PARTIES TO THE PROCEEDINGS**

All parties intending to participate in either of the above-captioned proceedings were required to file a Notice of Intent to Participate ("Notice") not later than December 20, 2001. A thorough review of these Notices revealed that, following Music Choice's decision to withdraw from the new subscription proceeding, there is absolutely no overlap among the parties to the two proceedings other than the Copyright Owners and Performers. To wit, the parties to Docket No. 2001-1 CARP DSTRA 2 are as follows: RIAA, AFTRA, AFM, XM, Sirius, Music Choice and DMX/AEI Music. The parties to Docket No. 2001-2 CARP DTNSRA are as follows: RIAA, AFTRA, AFM, Yahoo! Inc. and RealNetworks, Inc. Given this, there can be no argument that any entity (other than the Copyright Owners and Performers) will be forced to bear the cost of participating in multiple proceedings.

### **III. DiMA'S COMMENTS ARE CONTRARY TO FACT AND WERE SUBMITTED ON BEHALF OF UNIDENTIFIED MEMBERS**

#### **A. DiMA's Comments Should be Given Little or No Weight Because DiMA is Not a Party to the Proceedings at Issue**

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Although DiMA chose to file Comments supporting consolidation, it did not choose to file a Notice of Intent to Participate in either of the proceedings that are the subject of the NOI. Thus, DiMA is not a party to either of these proceedings. Even if this does not technically disqualify DiMA from filing comments, it should be required to reveal the identity of its members and/or to state which of them has a putative interest in the consolidation of the proceedings at issue here, neither of which DiMA's Comments do. In view of these deficits, the DiMA Comments should be given little or no weight by the Copyright Office.

#### **B. Contrary to DiMA's Assertions, Consolidation Will Not Avoid Duplication of Evidence Nor Will it Save Time or Money**

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Although DiMA's Comments purport to make four separate arguments against consolidation, its arguments all boil down to one single point – that, in DiMA's view, consolidation would be more efficient and save money. While separate proceedings will undoubtedly give rise to a modicum of duplicative evidence, because of the pervasive differences in the nature of the services at issue in these proceedings and their respective markets, the overwhelming majority of the witnesses and evidence that will be presented in each proceeding will be different, not the same. As shown below, DiMA's claims to the contrary simply do not withstand scrutiny.

First, as discussed above, the Notices of Intent to Participate reveal no overlap among the parties to the two proceedings. Accordingly, no party (other than Copyright

Owners and Performers) will be forced to bear the cost of participating in multiple proceedings, despite DiMA's attempt to suggest otherwise.

Second, DiMA's Comments gloss over the numerous and fundamental differences between the three groups of services involved in these proceedings: pre-existing subscription services that provide their programming as a value-added service through cable and satellite television systems, pre-existing satellite digital audio radio services that provide their programming via satellite to dedicated hardware devices pursuant to special FCC-licenses and new subscription services that apparently provide their programming to general purpose computers via the Internet. Not only do the three groups of services deliver their programming through different media to different end users who use different equipment to receive the programming, they also operate in completely different markets, with different price and cost structures, different competitors and different business models.

All of these differences will necessitate a host of non-overlapping expert and fact witnesses tasked with the job of educating the arbitrators about the various technological and business issues confronting the three groups of services. It is simply not the case, as DiMA alleges, that "the parties in each arbitration will be presenting a substantial volume of common evidence." DiMA Comments at 1. Nor is it the case that "witnesses from these [different] services might be called to testify in more than one proceeding," DiMA Comments at 1, or that "witnesses from one type of service" might have "information [that] remains relevant" in a proceeding where the witnesses' "service is not implicated," DiMA Comments at 1-2.

Copyright Owners and Performers agree with DiMA that "expert witnesses will be required to prepare and analyze the market for all of these services." DiMA

Comments at 2. However, Copyright Owners and Performers fail to see how it would be any more efficient to have expert witnesses analyze these three disparate groups of services – effectively sub-industries – in one proceeding as opposed to two. DiMA’s Comments cite no evidence that the services operate in overlapping or similar markets. Moreover, even assuming that each side chose to use a single expert to analyze the markets for all of the services at issue in these proceedings, that expert would have to prepare what amounts to three separate reports (even if submitted under one cover) and give direct testimony and be subject to cross examination about three separate sub-industries, regardless of whether there is one proceeding or two.

Third, even if DiMA were right about the services’ need to present some overlapping testimony in the two proceedings, there are certain procedural measures available that would allow DiMA’s members to do this inexpensively and efficiently. For example, DiMA members could take advantage of Copyright Office rules that permit parties to any given Copyright Arbitration Royalty Panel (“CARP”) to introduce evidence presented in one or more previous CARPs simply by designating relevant testimony from past records. See 37 C.F.R. §251.43(c) & 251.48(a).

Fourth, DiMA’s Comments fail to address the substantial differences in the legal standards the arbitrators will be required to apply in the two proceedings and entirely overlook the fact that the parties will be required to present different types of evidence under each of the legal standards. As described more fully in Copyright Owners and Performers’ Joint Opposition, these differences will make a consolidated proceeding far more complicated and confusing than two separate proceedings. In addition, these differences make it likely that a consolidated proceeding will result in prejudice to one or more of the parties.

#### **IV. XM AND SIRIUS AGREE THAT CONSOLIDATION IS INAPPROPRIATE**

According to the XM/Sirius Comments, XM and Sirius “oppose the inclusion of any new subscription services in the Pre-existing Services CARP and also oppose consolidation of any New Subscription Services CARP with the upcoming Pre-existing Services CARP. There is a substantial risk that consolidation would cause unnecessary confusion and complexity in a proceeding that is already likely to be confusing and complex.” XM/Sirius Comments at 2.

XM and Sirius base their opposition on the same factors cited in the Copyright Owners and Performers’ Joint Opposition, namely, that the two proceedings are governed by very different legal standards, that the rates at issue are subject to adjustment at different time intervals and that the services at issue in the two proceedings are so different as to make substantial additional evidence, particularly expert testimony, necessary in a consolidated proceeding.

#### **CONCLUSION**

Copyright Owners and Performers submit that the Copyright Office should either withdraw the NOI or reject Music Choice’s request for consolidation on the ground that Music Choice’s Motion to Withdraw (dated December 13, 2001) rendered its original request moot. In the event that the Copyright Office rejects this argument, Copyright Owners and Performers urge the Copyright Office to reject the request for consolidation for all of the reasons set forth above and for the reasons set forth more fully in the Copyright Owners and Performers’ Joint Opposition to Request for Consolidation (dated December 20, 2001) and in the Joint Comments of XM Satellite Radio, Inc. and Sirius Satellite Radio Inc. (dated December 20, 2001).

Respectfully submitted,

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